No. 12499

In The United States Court of Appeals

For the Ninth Circuit

PENNSYLVANIA SALT MFG. CO., of Washington, a corporation, *Appellant*,

— vs. —

OSCAR VIRGIL HAYNES, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING

FRANK M. PRESTON,
PRESTON, THORGRIMSON & HOROWITZ,
Attorneys for Appellant.

2000 Northern Life Tower,
Seattle 1, Washington.

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INDEX

TABLE OF CASES

STATUTES

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To the United States Court of Appeals for the Ninth Circuit and to the Honorable Judges Thereof:

Comes now Pennsylvania Salt Mfg. Co. of Washington, a corporation, the appellant in the above entitled cause, and presents this, its petition for rehearing in the above entitled cause, and in support thereof respectfully shows:

I. Statement of basic grounds of petition for rehearing.

The opinion of the court filed therein on September 18, 1950, holds in effect that the immunity from suit contained in the following proviso of the Industrial Insurance Act of the State of Washington (Rem. Rev. Stat., Sec. 7675):

> "Provided, however, that no action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman

> was in the course of any extrahazardous employment under this act"

is not applicable to the state of facts presented in the case at bar for the reason that the accident which caused the injury did not occur at the same time as the negligence causing the accident, although the opinion recognizes the connection between the plaintiff's injury and the defendant's extrahazardous employment. The opinion of the court rests upon the conclusion that because the connection between the plaintiff's injury and the defendant's extrahazardous employment was not temporal, the defendant is not within the immunity provision above quoted.

It is submitted that this conclusion effectually overrules the decisions of the Washington State Supreme Court and is directly in conflict with the underlying purpose and theory of the industrial insurance system of the State of Washington as expressed in the decisions of the Washington Supreme Court.

II. Where injury is result of negligence occurring during extrahazardous employment, immunity applies.

As stated by the Washington Supreme Court in *Gephart v. Stout*, 11 Wn.(2d) 184, 118 P.(2d) 801, in order to qualify for the immunity afforded by the statutory proviso, the employer must be in the course of some extrahazardous employment under the Industrial Insurance Act at the time of the accident, and that this requirement will be satisfied if the negligent act or omission which is the basis of the workman's cause of action arises out of, or in some

way connected with, an extrahazardous employment or business then being carried on by the employer.

In each of the cases where it appeared that the defendant was a contributor to the industrial insurance fund and in which immunity was denied under the proviso, the negligence which caused the injury was negligence which did not occur in any extrahazardous operation or activity of the defendant's business.

In *Pryor v. Safeway Stores, Inc.*, 196 Wash. 382, 83 P.(2d) 241, the negligence of the defendant's servant which caused the plaintiff's injury occurred in the course of a nonhazardous employment.

In *Gephart v. Stout, supra*, the negligence of the defendant, which caused the plaintiff's injury, occurred while the defendant was engaged in an activity having no connection with the defendant's extrahazardous business.

The *Pryor* case and the *Gephart* case are the only cases which the Washington court has decided wherein immunity was denied under the proviso in which it appeared that the defendants were contributors to the industrial insurance fund. As stated above, in both of said cases the negligence which caused the injury did not occur in any extrahazardous operation or activity of the defendant's business.

We submit that these cases, together with the cases relied upon in the appellant's brief, clearly illustrate the principle, recognized by the opinion of this court, that where the plaintiff's injury was caused by negligence of the defendant or his employees, occurring

during extrahazardous employment, the statutory immunity will be applied.

III. The dicta in the case of *Weiffenbach v. Seattle*, 193 Wash. 528, 76 P.(2d) 5899, should not be controlling.

The opinion of the court states that the rule stated in the dictum of the Washington Supreme Court in the case of *Weiffenbach v. Seattle*, 193 Wash. 528, 76 P.(2d) 589, is controlling. This dictum is as follows:

> "If the city had abandoned the use of the wire for the transmission of electricity so that it was no longer performing a function as a part of its operating system, then, of course, it would be a mere condition within the principle contended for by the appellant. It would be then no longer a part of the industry or the extrahazardous employment in which the respondent was engaged."

It is submitted that the dictum itself is based upon a completely illogical and untenable premise. The dictum assumes a situation where the city had abandoned the use of wire for the transmission of electricity. If the city had abandoned the use of the wire for the transmission of electricity, *then there could have been no injury;* the plaintiff's injury in the *Weiffenbach* case was caused by coming into contact with a current of electricity which was then passing through the wires of the electric transmission system operated by the city. It is clear then that the suppositious statement upon which the dictum is based has no basis whatsoever. Certainly the court in the *Weiffenbach* case did not mean to say that the immunity afforded by the proviso would not be available to the

city as a defense if the plaintiff had been injured, as he was injured, by contact with electric current after the wire had been abandoned by the city; if electric current was still being transmitted thru the wire, after its abandonment, the negligence would still have occurred during the extrahazardous operation.

It is submitted that this clearly indicates the danger and the futility of deciding one case upon ill-considered and illogical dictum contained in the decision of another case.

It is further submitted that there is no basis in precedent whereby Federal courts are in any manner bound by dicta contained in the decisions of the state courts. Moreover it is axiomatic that not even state courts are bound by the dicta contained in the opinions of such courts.

It is submitted that the dictum in the *Weiffenbach* case should not afford the basis for the decision in the case at bar.

IV. Washington decisions do not restrict application of the immunity proviso to cases where negligence and injury are simultaneous events.

Both the appellant and the appellee in this case have submitted to this court all of the decisions of the Washington Supreme Court wherein the above quoted immunity proviso has been interpreted. It is submitted that in none of these decisions is there any statement that could be reasonably interpreted as setting forth the rule that the negligence of the defendant or his servants in the course of extrahazardous employment and the plaintiff's injury must be simultaneous

events. The opinion of the court in the case at bar is based, as above stated, upon the premise that the connection between the negligent act and the injury must be both causal and temporal. Nowhere in any of the decisions of the Washington court is there any suggestion that the negligence and the accident causing the injury must occur at the same time.

In this respect it is submitted that the opinion of the court is in direct conflict with the underlying purpose and theory of the Industrial Insurance System of the State of Washington as expressed in its decisions, three of which were not referred to in the opinion, although thoroughly discussed in the appellant's brief.

In the case of *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 158 Pac. 256, the Washington court said:

> "Ours is not an employer's liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the industrial insurance commission. All the features of an insurance act are present."

Although the opinion of the court considers the controlling rule to be the dictum in the *Weiffenbach* case, the opinion does not consider the statements included in the *Weiffenbach* decision which formed the basis of the court's conclusion therein. It should be remembered that in the *Weiffenbach* case the court held that the city was entitled to the immunity afforded by the statute. This court's attention is again directed to the followng language of the court in the *Weiffenbach*

case which states very clearly the fundamental nature of the system of industrial insurance in the State of Washington:

> "The wire was an integral part of respondent's electric system used in the transmission and distribution of its product. It was extrahazardous, defined so by the statute, and respondent was required to, and did, pay into the industrial insurance fund of the state assessments levied upon its payroll as its ratable contribution for the protection, *not of its own employees alone, but of the whole body of employees of the State engaged in extrahazardous industry.* * * *
>
> "The immunity from a suit here involved must have been granted by the 1929 legislature as a recriprocal compensation to industry for the burden it assumes as an aggregate unit in providing, in the language of the statute,
>
> "'* * * sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents * * * regardless of questions of fault. * * *'." (Emphasis ours)

Again in *Koreski v. Seattle Hardware Co.*, 17 Wn. (2d) 421, 135 P.(2d) 860, the court repeated the fundamental purpose of the statute in the following language:

> "Those who comply with the terms and conditions of the workmen's compensation act are entitled to all the benefits of the act and subject to all of the liabilities of the Act. *As appellant complied with the terms of the workmen's compensation act, immunity from liability for negligently injuring respondent, who was the employee of another employer, is a benefit to which*

appellant is entitled under the act." (Emphasis ours)

We would also again submit for the court's consideration the opinion of the court in *Boeing Aircraft Co. v. Department of Labor & Industries*, 22 Wn.(2d) 423, 156 P.(2d) 640, wherein the purpose, policy, and history of the industrial insurance system of the State of Washington is reviewed and certain well defined and well accepted rules are expressed. In said decision at page 434, the court says:

> "As stated above, prior to 1927, an employee injured at his employer's plant had no right of action against any third person. From 1927 to 1929, the employee covered by the act, if injured either away from or at the plant, could elect to take under the statute or sue a negligent third party. *Since 1929 an injured employee could sue a negligent third person only if such person was not an employee or employer under the coverage of the statute.* * * *" (Emphasis ours)
>
> "In 1929 the privilege was withdrawn as to other workmen and the employers likewise under the statute. Industry acquired, under the 1929 statute, an immunity from common-law actions with potentially larger damage claims in exchange for its assumption, in the aggregate, of limited responsibility to its employees without fault."

In the same opinion we submit that the Washington Supreme Court sets down the rule which should be decisive of the case at bar. At page 435 the court states:

> "Under the workmen's compensation act, all civil causes of action for personal injuries sus-

tained in industrial accident arising out of extrahazardous employment are abolished except in those cases where the act expressly preserves or creates a right of action; and in all such cases the rights of action are purely statutory, and not common-law rights. *An employer who complies with the terms of the workmen's compensation act is entitled to all of its benefits, including immunity from liability or negligently injuring the employee of another employer. A workman, under the workmen's compensation act at the time he was injured through the negligence of an employee of another company, may not maintain an action against the company the negligence of whose employee or employees caused the injuries, where that company had complied with the provisions of the act which affords immunty from suit in such circumstances.*" (Citing *Koreski v. Seattle Hardware Co., supra*) (Emphasis ours)

The last sentence of the above quoted statement from the *Boeing Aircraft Company* case, we submit, states the most authoritative interpretation of the immunity proviso. This statement is very simple, direct, and to the point. It is to the effect that if a workman under the Workmen's Compensation Act at the time of his injury is injured through the negligence of an employee of another company, which occurs during an extrahazardous operation, he may not maintain an action against the latter company, the negligence of whose employee caused the injury, if that company has complied with the provisions of the Industrial Insurance Act. We submit that no language could be more clear or direct. We submit further that

this statement is certainly a more complete and authoritative expression of the interpretation which the Washington Supreme Court has placed upon the proviso, than is the illogical and inconsistent dictum contained in the *Weiffenbach* case.

We submit that there can be no doubt but that the Pennsylvania Salt Manufacturing Co. was fully covered by the Industrial Insurance Act; being so fully covered, the plaintiff's remedy was against the industrial insurance fund.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted, and that the opinion of this court as endorsed and filed on September 18, 1950, which affirmed the judgment of the United States District Court, Western District of Washington, Northern Division, upon further consideration, be set aside.

Respectfully submitted,

FRANK M. PRESTON,
PRESTON, THORGRIMSON & HOROWITZ,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

We, counsel for the above named petitioner, do hereby certify that the foregoing Petition for Rehearing in this cause is presented in good faith and not for delay.

FRANK M. PRESTON,
PRESTON, THORGRIMSON & HOROWITZ,
Attorneys for Appellant.